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Scott R. Mosko (State Bar No. 106070)
scott.mosko@finnegan.com
FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.
Stanford Research Park
3300 Hillview Avenue
Palo Alto, California 94304
Telephone: (650) 849-6600
Facsimile: (650) 849-6666

Attorneys for Defendants ConnectU Inc.,
Specially appearing for Cameron Winklevoss,
Tyler Winklevoss, and Divya Narendra

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FACEBOOK, INC. and MARK ZUCKERBERG,

Plaintiffs,

v.

CONNECTU LLC, (now known as CONNECTU INC.) CAMERON WINKLEVOSS, TYLER WINKLEVOSS, DIVYA NARENDRA, PACIFIC NORTHWEST SOFTWARE, INC., WINSTON WILLIAMS, WAYNE CHANG, and DAVID GUCWA,

Defendants.

CASE NO. C 07-01389 RS

**DEFENDANTS CONNECTU, INC., CAMERON WINKLEVOSS, TYLER WINKLEVOSS AND DIVYA NARENDRA'S OPPOSITION TO PLAINTIFFS' MOTION FOR EVIDENTIARY AND RELATED SANCTIONS, INCLUDING SANCTIONS PURSUANT TO 28 U.S.C. § 1927**

Date: October 10, 2007
Time: 9:30 a.m.
Dept.: 4
Judge: Hon. Richard Seeborg

Dockets.Justia.com

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## I. INTRODUCTION

Facebook's motion contains at best a series of mischaracterizations, and at worst, outright misrepresentations of events. To begin its story, Facebook relies on an interrogatory answer that emanated from a vague question. Facebook contends the answer was deceptive. An examination of the question and the response reveals that the response, which is the prime basis for Facebook's motion, was appropriate. Facebook continues its story by quite surprisingly contending that the parties who answered this interrogatory "recanted" it. This argument is amazing because Facebook made this very pitch to the Massachusetts Court, where this so-called "recanted" testimony was offered. However, the Massachusetts Court effectively rejected Facebook's claim that the interrogatory response was inconsistent with this subsequent testimony. This finding should have convinced Facebook that any claim for sanctions concerning these same events is unmeritorious. Undaunted, Facebook repackages the failed argument in the Massachusetts Court into this motion for sanctions.

Facebook stretches the truth and the events discussed below to an unacceptable level. Neither the actual facts nor the law concerning sanctions, when the true facts are applied to this law, would convince a reasonable party to even consider filing this motion. As demonstrated below, Facebook miscites, misquotes and/or misconstrues Orders and testimony in this failing attempt to support its sanction motion. It should be denied.

## II. ARGUMENT

### A. Facebook's Assertion that Either the Superior Court or the Massachusetts Court Has Been Misled by Inconsistent Testimony has Already Been Rejected by the Massachusetts Court

Facebook contends sanctions should be issued because of inconsistent positions taken in this litigation as compared to the Massachusetts case. However, the issue of whether inconsistent testimony was provided was already raised and decided against Facebook in the Massachusetts case. Judge Collings looked at the very testimony and discovery responses Facebook here raises in support of its motion. Judge Collings said, "it cannot be stated that the testimony is completely contradictory." Mosko Decl. Exh. I at 24. From this finding alone, this motion must be denied.

The Massachusetts case in which ConnectU claims that Facebook principals stole the concept and ideas behind what is now www.facebook.com was filed in September 2004. Mosko Decl. Exh. II at ¶¶ 12-21. A year later, Facebook, then calling itself TheFacebook, Inc., filed a retaliatory action in the Superior Court of California asserting that ConnectU and its principals wrongfully downloaded information from its website. ConnectU's principals, Cameron Winklevoss, Tyler Winklevoss, Howard Winklevoss and Divya Narendra filed a Motion to Quash because the California Court could not exercise personal jurisdiction over them.

Facebook contended it could not oppose the Motion to Quash without taking discovery.[1] Facebook then propounded 345 Interrogatories (the first set comprising 230 separate interrogatories, the second set comprising 115), 120 Document Requests and 125 Requests for Admission. Mosko Decl. Exh. VII. Facebook also noticed four individual depositions, and one corporate deposition pursuant to Code of Civil Procedure section 2025.230 that included 14 separate topics. Mosko Decl. Exh. VIII.

During the pendency of the Motion to Quash, Facebook was pursuing its own Motion to Dismiss the Massachusetts case, alleging lack of complete diversity. It was apparent to ConnectU and its principals that the underlying reason for much of Facebook's oppressive discovery requests in the California action was to support its Motion to Dismiss. Indeed, the Superior Court rejected well over half of the written discovery requests, limiting Facebook to three (3) out of fourteen (14) deposition topics, and limiting each deposition to 2 ¾ hours, despite Facebook's request that full day depositions be allowed. *See* footnote 1.

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[1] Facebook mischaracterizes ConnectU's principals' initial opposition to this oppressive discovery. In the motion for sanctions, Facebook claims "ConnectU resisted all discovery, forcing Facebook to seek relief from the Superior Court on several occasions. *Id.* Exs., CC, DD, EE. The California Court repeatedly sided with Facebook, and issued a number of orders granting motions to compel discovery sought by Facebook." Moving Papers at 5. In truth, the Court record that Facebook conveniently fails to attach or cite, demonstrates that the Court agreed with ConnectU's contention that most of Facebook's requests were improper. Mosko Dec. Exh. III, IV & VI. Out of the fourteen (14) topics Facebook sought to inquire in its alleged jurisdictional deposition, the Superior Court allowed just three (3). Mosko Decl. Exh. III. Santa Clara Superior Court (Woodhouse, J) Order Dated January 6, 2006. Facebook contested defendants' answers to 84 Special Interrogatories and the court granted its motion to compel on only 18, ordering that defendants need not provide additional responses. Mosko Decl,. Exh. IV. Santa Clara Superior Court (Kleinberg, J) Order Dated February 17, 2006. Additionally, Facebook moved to compel further responses to 155 Form Interrogatories and the court granted its motion on only 47, again ordering that defendants need not provide additional responses for the remainder. Mosko Decl. Exh. VI. Santa Clara Superior Court (Manoukian, J) Order dated March 10, 2006.

Not surprising to ConnectU, much of the discovery that Facebook insisted upon taking in the California action was used in the context of the Motion to Dismiss in Massachusetts. Specifically, Divya Narendra's membership in ConnectU, which case law quite clearly held to be irrelevant in the Superior Court Motion to Quash, was of great interest to Facebook in the context of its Motion to Dismiss. Much of the discovery in the California case concerned the timing of Mr. Narendra's membership in ConnectU. *See e.g.,* Facebook's citation to such discovery in its Moving Papers at 6.

The interrogatory and its response that are the source of Facebook's inconsistent testimony argument in this motion was Number 14, which reads:

> IDENTIFY current AND former directors, officers, employees, AND agents of CONNECTU (including without limitation, Members, Managers AND Board of Managers as defined in the Limited Liability Company Operating Agreement of ConnectU, LLC -- bates numbers C011285 through 011335), HARVARDCONNECTION, AND WINKLEVOSS COMPANIES, including without limitation, dates in these positions, duties, job descriptions, authorities AND responsibilities. Mosko Decl. Exh. IX, at 8.

The amended response to this interrogatory that Facebook contends was inconsistent with testimony later provided in the Massachusetts case reads in part:

> Responding party incorporates his initial response and objections herein to this amended response. In addition, Responding Party responds as follows: Members of ConnectU include Cameron Winklevoss, Tyler Winklevoss, Howard Winklevoss, and Divya Narendra, as set forth in the Limited Liability Company Operating Agreement recited in the Interrogatory ("Operating Agreement") and found at bates numbers C011285 through 011335. These persons have all been members since ConnectU was formed . . . Mosko Decl. Exh. X, at 5.

Facebook spent considerable time and effort cross examining the ConnectU witnesses in depositions noticed in the Massachusetts case and in hearings before Judge Collings about this California discovery response. Proving its lack of relevance in the California motion to quash proceeding, this interrogatory response was not even raised during depositions Facebook insisted upon taking in the California action in its jurisdictional discovery efforts. Mosko Decl. Exh. XI.

In the Massachusetts proceeding, Facebook tried to convince Judge Collings that deposition testimony, subsequent declarations[2] and hearing testimony were so inconsistent with this discovery response that ConnectU should be estopped from asserting such testimony or relying upon it. However, Judge Collings issued an Order rejecting Facebook's claim that the discovery responses in the California case judicially estopped ConnectU from further explaining its position. Quite contrary to Facebook's inconsistency argument, Judge Collings found that Mr. Narendra's subsequent declaration and testimony were not "completely contradictory" to this discovery response. Mosko Decl. Exh. I, at 24.

As his Order provides, Judge Collings went through a detailed examination of the response to Interrogatory No. 14, and the testimony which Facebook now contends should be the basis for sanctions in this motion. Citing case law on judicial estoppel, Judge Collings stated in part that if a court is to reject subsequent testimony based on an allegation that it is inconsistent with earlier positions, "either the first court [has to have] been misled or the second court will be misled…" *Id* at 9. Applying this standard, Judge Collings found no inconsistency, and therefore rejected Facebook's judicial estoppel argument. Judge Collings effectively concluded that the Superior Court was not misled by the asserted discovery responses, and that the Massachusetts Court would not be misled by admitting ConnectU's subsequent declarations and testimony.

Moreover, Judge Collings accepted Narendra's testimony in his courtroom that Narendra was not a ConnectU LLC member on September 2, 2004, even though the response to Interrogatory No. 14, on which Facebook relied, said that he was. Mosko Decl. Exh. I, at 55. There is no inconsistency because Narendra was not a member on September 2, 2004, as Judge Collings' ruled, but by the time he provided the interrogatory response he had been made a member retroactively to ConnectU LLC's April 6, 2004 formation, when he signed ConnectU's Operating Agreement on August 5, 2005. See Section II. C, *infra*. Thus, when he signed the interrogatory response, he was able to say that he was a member "since ConnectU was formed."

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[2] In the relevant portion of these declarations, Narendra reconciled any perceived inconsistencies between his response to Interrogatory No. 14 and the statements made in the Massachusetts action. See Mosko Decl. Exh. XII. Specifically, Narendra explained that prior to the formation of ConnectU, he had accepted a job offer in New York City and expected to have very little time to devote to ConnectU. Narendra stated that "[b]ecause of my job, I was unable to contribute time or effort to ConnectU on or about September 2, 2004. *Id.* At that time, I was uncertain what, if any, contributions I could make to ConnectU, monetary or otherwise, or whether I wanted to assume any of ConnectU LLC's potential liabilities." *Id.* Narendra further declared that "[b]ecause our respective roles, contributions, and shares in the company were uncertain, I was not made a Member of ConnectU LLC until well after September 2, 2004." *Id.*

So, the essence of Facebook's argument here is that this Court should reject Judge Collings findings and Order, and instead conclude that this alleged inconsistency between the discovery responses and the subsequent Massachusetts Court testimony defrauded the Superior Court and/or the Massachusetts Court, and was so egregious and so vexatious that sanctions should issue. *See* Facebook's Moving Papers at p. 1 where it states "[sanctions should issue] due to Defendants' and their counsel's deceptive actions related to averments made in this action concerning membership in ConnectU LLC." In fact however, Judge Collings' Order should have ended the issue Facebook raises in this motion, namely whether ConnectU committed any wrongdoing in the course of submitting subsequent testimony in the Massachusetts case as it concerns membership issues of its principals.

Facebook's position of inconsistency was rejected by Judge Collings, and should be rejected by this Court. ConnectU's responses to irrelevant discovery cannot serve as a basis for sanctions and Facebook's attempt to relitigate an issue already decided against it should not be tolerated.

**B. The So-called Inconsistency Could Not Have Influenced the Superior Court in Deciding the Motion to Quash Because Facebook Never Made the Discovery Responses it Contends to be the Source of the Inconsistency Part of the Superior Court Record**

Facebook's argument that the allegedly inconsistent discovery responses as compared to Massachusetts Court testimony, persuaded the Superior Court to grant a motion to quash, is flat wrong. As Judge Collings found, these discovery responses were not inconsistent with later testimony. And, in any event, these responses about which Facebook complains in this motion could not have had any effect on the Superior Court's decision to grant the Motion to Quash because *Facebook never made these discovery responses part of the Superior Court record*. Moreover, the

Superior Court never saw the discovery responses about which Facebook complains in this motion because they were irrelevant to whether the Superior Court could exercise jurisdiction over the individual defendants.

Simply stated, the Superior Court could not have relied upon something that it never saw. The irrelevant discovery at issue in this motion for sanctions concerns when or how individual defendants, and in particular, Divya Narendra, became a member of ConnectU. In its discovery efforts, that Facebook contended were necessary and relevant to the issues in the Motion to Quash, Facebook asked defendants about their membership status in ConnectU in multiple ways. As quoted above, Facebook propounded Interrogatory No. 14. Facebook cites to and characterizes additional discovery responses that Facebook claims deceived the Superior Court. Facebook asserts that this discovery shows that "in more than 100 instances" individual defendants contend that they acted on behalf of ConnectU. *See* Moving Papers at 6, citing Chatterjee Exhibits O, Q, GG, MM, NN, OO, PP QQ, RR, SS, TT and UU.

Facebook's opposition to the Motion to Quash was filed after the defendants served their discovery responses that Facebook contends were the basis for the Superior Court's Order granting this Motion to Quash. Facebook's Opposition to the Motion to Quash is attached to the accompanying Mosko Declaration, Exhibit V-4. The response to Interrogatory No. 14 and the related discovery (i.e. these 100+ instances), are not quoted or even referenced in Facebook's opposition to the Motion to Quash. Nor are these discovery responses attached to the declarations filed in support of this opposition. *See* Mosko Decl. Exh. V-5. Hence Facebook's claim that the Superior Court relied upon them is patently untrue. This motion as it concerns these discovery responses must be denied.

Without question, Facebook knew that the timing and circumstances of Mr. Narendra's and the other individual defendants' membership in ConnectU (the position allegedly asserted in these 100+ discovery responses) were irrelevant to whether the California Court could exercise jurisdiction over them. Facebook had done thorough and compelling research proving this membership issue to be irrelevant. These cases were cited and quoted in Facebook's Opposition to the Motion to Quash. *See* Mosko Decl. Exh. V-4. Facebook's opposition convincingly established that a person's official status or capacity in a fictitious entity cannot immunize that person from the personal jurisdiction of a forum, even where the alleged wrongful actions were taken in that person's official capacity. *Id.* at 6. Accurately citing and quoting two 1984 United States Supreme Court cases, *Calder v. Jones*, 465 U.S. 783 (1984) and *Keeton v. Hustler Magazine, 465 U.S. 770 (1984)*, Facebook's opposition to the Motion to Quash states, "' We today totally reject the suggestion that employees who act in their official capacity are somehow shielded from suit in their individual capacity [from personal jurisdiction].'" Mosko Decl. Exh. V-4 at 6. Facebook further and correctly emphasized in its Opposition: "in California there simply is no 'fiduciary shield' or jurisdictional immunity for non-resident corporate officers or directors or general partners who act on behalf of a corporation or partnership if the individual's behavior otherwise would subject them to personal jurisdiction." *Id.*

The circumstances surrounding the Motion to Quash were as follows: Facebook's Superior Court Complaint alleged that individual defendants had wrongfully accessed Facebook's website and downloaded information that Facebook contended was confidential or proprietary. Mosko Decl. Exh. XIII, at ¶ 19. Individual defendants' Motion to Quash asserted that the California Court could not exercise personal jurisdiction over them. As with all motions challenging the exercise of personal jurisdiction over a defendant, the plaintiff has the burden of establishing the facts allowing the forum court to assert jurisdiction. *Rio Properties, Inc.* v. *Rio Int'l Interlink*, 284 F.3d 1007, 1019 (9th Cir.2002).

As demonstrated, for the real purpose of discovering issues related to its Motion to Dismiss, Facebook propounds this irrelevant discovery that forms the basis of its current motion for sanctions, i.e. Chatterjee Declaration Exhibits O, Q, G, GG, MM, NN, OO, PP, QQ, RR, SS, TT and UU. *See* Moving Papers at 6. Having already done research that concludes such discovery, i.e. the circumstances surrounding individual defendants' membership in ConnectU, to be irrelevant in the Motion to Quash, Facebook files its opposition without citing or referring to this discovery. Essentially, Facebook, by its correct and logical decision not to make this discovery or the responses to it part of the Superior Court record, concedes this discovery was irrelevant and could not have been a basis for that Court's order granting the Motion to Quash.

Yet despite this concession, in this motion, as in the unsuccessful motion for judicial estoppel before Judge Collings, Facebook argues that the Superior Court granted the Motion to Quash because of Mr. Narendra's membership in ConnectU. Compare Facebook's argument in the motion for judicial estoppel, Mosko Decl. Exh. XV, at 8-14, with Facebook's moving papers in this motion, at page 7. Amazingly, in its Moving Papers, Facebook tells this Court it believes the Superior Court granted the Motion to Quash based on individual defendants' discovery responses, asserting they acted in their capacity as members of ConnectU LLC. *See* Moving Papers, page 7, lines 20 - 23. Not only does this argument fly in the face of the United States Supreme Court authority Facebook cited in its opposition to the Motion to Quash, it also ignores the complete record as it concerns said motion.

In the individual defendants' Reply to the Opposition to the Motion to Quash, they did not respond to the authority cited by Facebook concerning their status with ConnectU. Instead, the Reply provides alternative compelling reasons, having nothing to do with the individual defendants' membership status in ConnectU, for the Superior Court to grant the Motion to Quash. As with most motions that raise the issue of whether a court can assert personal jurisdiction over a defendant, and as this Court recently commented, such issue is "joined" in and through the opposition and reply papers. Yet, Facebook ignores individual defendants' reply when it contends the Superior Court granted the Motion to Quash because of Mr. Narendra's ConnectU membership status.

In summary, Facebook contends that this Court should conclude that the Superior Court granted Defendants' Motion to Quash based on a doctrine long ago rejected by the United States Supreme Court. *Calder* v. *Jones*, 465 U.S. 783, 790 (1984) (holding that a person's status as employee "does not somehow insulate them from jurisdiction"). The Superior Court's Order itself fails to confirm that it rejected binding Supreme Court precedent. Mosko Decl. Exh. XVI. Facebook also urges that this Court find that the Superior Court relied upon Narendra's membership status in ConnectU and subsequently applied the Corporate Shield doctrine in granting the motion. Again, the Superior Court's Order fails to so confirm. *Id.* Neither premise is supported by the facts. This motion must be denied.

### C. Sanctions Cannot Issue as a Result of a Claimed Inconsistency in Testimony Stemming From a Poorly Worded Interrogatory

The crux of Facebook's claim for sanctions stems from Mr. Narendra's response to an interrogatory effectively shown in the section above to be irrelevant to the issues for which it was purportedly propounded. This interrogatory was vague and poorly written. As demonstrated below, sanctions cannot issue as a result of the response to this interrogatory. The response was accurate, made in good faith, and as Judge Collings found was not inconsistent with subsequent testimony submitted in the Massachusetts case.

Facebook claims that the source of the claimed inconsistent testimony is the response to Interrogatory No. 14, which reads:

> IDENTIFY current AND former directors, officers, employees, AND agents of CONNECTU (including without limitation, Members, Managers AND Board of Managers as defined in the Limited Liability Company Operating Agreement of ConnectU, LLC -- bates numbers C011285 through 011335), HARVARDCONNECTION, AND WINKLEVOSS COMPANIES, including without limitation, dates in these positions, duties, job descriptions, authorities AND responsibilities. Mosko Decl. Exh. IX, at 8.

This interrogatory refers to the Limited Liability Company Operating Agreement, a copy of which is attached as Exhibit XIV to the Mosko Declaration. Facebook argues that this interrogatory asks for the dates the individual defendants became ConnectU LLC members. Facebook further contends that individual defendants' responses to this interrogatory were so directly inconsistent with subsequent testimony provided in the Massachusetts Court that this Court should issue sanctions. However, the vague drafting of this interrogatory makes this contention meritless. Indeed, as shown in section II.A, *supra*, Facebook made the same argument, i.e. that defendants' response to this interrogatory was inconsistent with subsequent testimony, in Massachusetts, and that court rejected the argument for the same reasons this Court should.

A review of Operating Agreement reveals that the company, ConnectU LLC was created in 2004. Mosko Decl. Exh. XIV, at 2. However, the Agreement was signed in 2005. The Agreement also contains a provision that states membership in the entity was retroactive to 2004. *Id.* When Divya Narendra answered this interrogatory he reasonably believed it asked for his interpretation of the Agreement. And, quite accurately and consistently with this Agreement, he responded in pertinent part that based on this Agreement, he, along with the other individual defendants in this case was a member "since ConnectU was formed." Mosko Decl. Exh. X, at 5.

Although never questioned about this interrogatory during the jurisdictional deposition in this case, Mr. Narendra was questioned extensively about it in the context of the Massachusetts discovery dedicated to the issues in the Motion to Dismiss. During that deposition, Mr. Narendra explained the circumstances surrounding the membership of ConnectU LLC. As Mr. Narendra explained, in 2004, at the time ConnectU LLC was formed, he and Cameron and Tyler Winklevoss orally agreed that the Winklevoss's would be the only members for the time being. *See* footnote 2. By 2005, when the Operating Agreement was signed, the circumstances surrounding the membership issues had changed, which resulted in Mr. Narendra becoming a member. The Operating Agreement was thereafter drafted to reflect that the Winklevoss's and Mr. Narendra were members.

Judge Collings credited this explanation as found in the Massachusetts court deposition testimony of Mr. Narendra. Judge Collings concluded that Mr. Narendra's interrogatory response was not completely contradictory to the latter testimony, which accurately stated that in 2004, prior to the execution of the Operating Agreement, Mr. Narendra was not a member of ConnectU LLC. In fact, in reaching his above-recited finding, Judge Collings quoted Mr. Narendra's testimony at length in his order:

> Q. Responding to 14 you say the members of ConnectU include Cameron Winklevoss, Tyler Winklevoss, Howard Winklevoss and Divya Narendra, correct?
>
> A. Correct.
>
> Q. And then you say all those persons have all been members since ConnectU was formed?
>
> A. That's what it says, yes. Can I just clarify something, though?
>
> *****
>
> Q. And when you say they had, these persons have all been members since ConnectU was formed, do you agree that conflicts

with your statement that only Cameron and Tyler were members of ConnectU LLC prior to September 2nd, 2004 in your declaration?

A. I think this actually may be misstated. What I'm referring to here is the operation agreement. That -

Ms. Esquenet: Let the record reflect that by "here" the witness is referring to the response to interrogatory number 14.

A. Right, so in interrogatory response number 14 when I say, or when it says that these persons have all been members since ConnectU was formed, I'm referring to the [execution] date as of this Limited Liability Company Operating Agreement in the sentence before.

Q. And when you say ConnectU was formed what do you mean by "formed"?

A. I think that refers to the actual LLC, but -- or it sounds as if that's what it means, but when I'm saying that, you know, what was meant to be said here is that I was a member as of the operating agreement date, not the, not since the formation of the LLC.

Mosko Decl. Exh. XVII at 173:9-175:7; cited in Judge Collings' March 2, 2007 Report and Recommendation at 22-23. Additionally, Mr. Narendra has maintained that when he responded to Interrogatory No. 14, he was answering to the best of his abilities at that time:

Q. So even though you now acknowledge that this answer [to Interrogatory No. 14] is not quite accurate with respect to the duration of your membership in ConnectU, you nevertheless signed this document under the pains and penalty of perjury; is that right?

*****

A. Right, because this, as it says here, I believed these responses to be true to the best of my knowledge. At the time.

Mosko Decl. Exh. XVII, at 278:13 - 279:12.

As shown, during his deposition Mr. Narendra outlined the problems with the interrogatory as drafted. And as shown, Judge Collings, in denying Facebook's motion for judicial estoppel, refused to estop ConnectU from arguing that Narendra was not a member on the filing date. Facebook's motion essentially asks this Court to reject Judge Collings' findings even though the interrogatory was vague and the witness explained his interpretation of it, making his subsequent statements about membership consistent with this answer. Sanctions are not appropriate. Moreover, it bears noting that Facebook never questioned Mr. Narendra about this response during the depositions it took in the California case. And, as shown, Facebook did not cite or rely on this interrogatory response in the course of the Motion to Quash proceedings. In any event, for the purpose of this motion, there is no inconsistency, and any issuance of sanctions based on this interrogatory response would be improper.

### D. The Court Is Not Vested With the Authority to Impose Sanctions in the Present Circumstances

The Plaintiffs are requesting that the Court impose sanctions pursuant to 28 U.S.C. §1927 and the Court's inherent powers. However, neither basis asserted will allow sanctions to issue in this case. Pursuant to §1927, the Court is vested with the power to impose sanctions against counsel who unreasonably or vexatiously multiplies the proceedings. Facebook has not shown any wrongdoing much less activity that comes close to the high threshold this section requires for a sanction award. Additionally, federal courts are vested with the inherent power to impose sanctions based on the bad faith conduct committed by the parties or their counsel. Similarly, the cases interpreting these inherent powers prevent a sanction award from issuing under these circumstances.

Facebook's motion for sanctions itself comes far closer to satisfying several bases for the imposition of sanctions, as the cases discussed below provide. The most frustrating part of having to oppose this motion is the fact that these same arguments submitted to support sanctions were already made before the Massachusetts Court in the context of Facebook's motion for judicial estoppel. The Massachusetts Court already disagreed with Facebook's assertion that any wrongdoing occurred. *See* Section II. A, *supra*. To say the least, based on the Massachusetts Court's decision in Facebook's failed motion for judicial estoppel, this motion should never have been filed. In any event, as shown below, neither §1927 nor the Court's inherent powers allow a sanctions award against defendants' or their counsel.

### 1. Sanctions Cannot Be Imposed Pursuant to 28 U.S.C. § 1927

28 U.S.C. § 1927 states:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs expenses and attorneys' fees reasonably incurred because of such conduct.

Section 1927 sanctions are not appropriate unless an attorney is shown to have acted in bad faith, with improper motive, or with reckless disregard of duty owed to the court. *Kanarek* v. *Hatch*, 827 F.2d 1389, 1391 (9th Cir.1987); *Toombs* v. *Leone*, 777 F.2d 465, 471 (9th Cir.1985); *United States* v. *Associated Convalescent Enterprises, Inc.*, 766 F.2d 1342, 1346 (9th Cir.1985). Section 1927 is permissive, not mandatory. The court is not obliged to grant sanctions once it has found unreasonable and vexatious conduct. It may do so in its discretion." *Corley* v. *Rosewood Care Ctr.*, 388 F.3d 990, 1014 (7th Cir.2004). Sanctions under § 1927 may be imposed when: (1) the attorney unreasonably multiplied the proceedings; (2) the attorney's conduct was unreasonable and vexatious; and (3) the conduct resulted in an increase in the cost of the proceedings. See 28 U.S.C. § 1927; *B.K.B.* v. *Maui Police Dep't.*, 276 F.3d 1091, 1107 (9th Cir.2002); *Pickern* v. *Pier 1 Imps. (U.S.), Inc.*, 339 F.Supp.2d 1081, 1091 (E.D.Cal.2004). As demonstrated in the above sections in this brief, the defendants actions as they concerned the Motion to Quash were reasonable and appropriate. The alleged inconsistent positions were not inconsistent. The discovery responses and the subsequent testimony have already been examined by the Massachusetts Court, and that Court declined a similar request to sanction defendants as a result of these responses and testimony. The proceedings were not "unreasonably multiplied," counsel's conduct was not "unreasonable and vexatious." Nor has anything in the Superior Court resulted in an improper "increase in the cost of the proceedings." This motion must be denied.

None of the Ninth Circuit cases discussing sanctions comes close to describing a basis for a sanction award against defendants. Even if the Superior Court discovery responses were inconsistent with later Massachusetts testimony--and Judge Collings found they were not inconsistent--defendants' reliance on such inconsistency falls far short of what the cases require for sanctions. An award of sanctions under 28 U.S.C. § 1927 requires a finding of recklessness or bad faith. *B.K.B.*, 276 F.3d at 1107; *Cline* v. *Industrial Maintenance Eng'g & Const. Co.*, 200 F.3d 1223, 1236 (9th Cir.2000). "The bad faith requirement sets a high threshold." *Primus Auto. Fin. Serv.* v. *Batarse*, 115 F.3d 644, 649 (9th Cir.1997). "Bad faith is present when an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent." *Estate of Blas* v. *Winkler*, 792 F.2d 858, 860 (9th Cir.1986) "We assess an attorney's bad faith under a subjective standard." *Pacific Harbor Capital, Inc.* v. *Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir.2000); *see New Alaska Dev. Corp.* v. *Guetschow*, 869 F.2d 1298, 1306 (9th Cir.1989). As the Ninth Circuit has explained,

> Bad faith is present when an attorney knowingly or recklessly raises a frivolous argument or argues a meritorious claim for the purpose of harassing an opponent. Tactics undertaken with the intent to increase expenses, or delay may also support a finding of bad faith. Even if an attorney's arguments are meritorious, his conduct may be sanctionable if in bad faith.

*New Alaska*, 869 F.2d at 1306 (internal citations omitted). Further, "if a filing is submitted recklessly, it must be frivolous, while if it is not frivolous, it must be intended to harass.... Reckless nonfrivolous filings, without more, may not be sanctioned" under §1927. *B.K.B.*, 276 F.3d at 1107, quoting *In re Keegan Mgmt. Co, Sec. Lit.*, 78 F.3d 431, 436 (9th Cir.1996). Where no previous court has considered a particular or novel issue, sanctions under §1927 generally are disfavored. *See Proctor & Gamble Co.* v. *Amway Corp.*, 280 F.3d 519, 531-32 (5th Cir.2002); *Serrato by & Through Serrato* v. *John Hancock Life Ins. Co.*, 31 F.3d 882, 887 n. 2 (9th Cir.1994). If sanctions are awarded, §1927 "authorizes the taxing of only excess costs incurred because of an attorney's unreasonable conduct; it does not authorize imposition of sanctions to reimburse a party for the ordinary costs of trial." *United States* v. *Associated Convalescent Enterprises, Inc.*, 766 F.2d 1342, 1347 (9th Cir.1985); see *New Alaska*, 869 F.2d at 1306; *Kirshner* v. *Uniden Corp. of Am.*, 842 F.2d 1074, 1081 (9th Cir.1988). Simply stated, for each of the reasons stated in Sections II. A - II. C of this brief, incorporated herein, none of the cases discussing §1927 support a finding of sanctions here.

### 2. Sanctions Cannot Be Imposed Pursuant to This Court's Inherent Powers

Federal courts are vested with the inherent power to assess attorney's fees against a party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 45-46 (1991); *Alyeska Pipeline Service Co.* v. *Wilderness Soc.*, 421 U.S. 240, 258-59 (1975); *Espinoza-Gutierrez* v. *Smith*, 94 F.3d 1270, 1279 (9th Cir.1996). The Supreme Court has stated that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion . . . [a] primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process" *Chambers*, 501 at 44-45. Awarding attorney fees based on bad faith conduct is punitive in nature, and generally is warranted only in exceptional cases and for dominating reasons of justice. *Brown* v. *Sullivan*, 916 F.2d 492, 495 (9th Cir. 1990). Mere recklessness, without more, does not justify sanctions under the court's inherent powers. *Fink* v. *Gomez*, 239 F.3d 989, 991-94 (9th Cir.2001). In sum, "sanctions are available if the court specifically finds bad faith or conduct tantamount to bad faith. Sanctions are available for a variety of types of willful actions, including recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose. *Fink* v. *Gomez*, 239 F.3d 989, 994 (9th Cir.2001). For the same reasons that sanctions are not possible under Section 1927, they should not be imposed pursuant to this Court's inherent powers.

### 3. The Court's Sanctioning Power Does Not Extend to Actions in a Separate Court Proceeding

In *GRiD Systems Corp.* v. *John Fluke Mfg. Co., Inc.*, 41 F.3d 1318 (9th Cir.1994), the Ninth Circuit held that "§1927 limits a federal court's ability to sanction an attorney for conduct before another court." *Id* at 1319. In *GRiD*, the John Fluke Manufacturing Company, Inc. ("Fluke") initially filed suit in federal district court against GRiD's subcontractor Dynatec Systems Corporation ("Dynatec") for breach of contract. Fluke also filed an arbitration action seeking indemnification from GRiD. Subsequently, GRiD filed suit against Fluke and Dynatec in state court. Fluke removed GRiD's state court action to the federal district court on diversity grounds and filed notice of the related action between Fluke and Dynatec. The multiple proceedings resulted in Fluke's motion for sanctions pursuant to Section 1927, which the district court granted, reasoning that GRiD's state court complaint, which had been removed to federal court by Fluke, unreasonably and vexatiously multiplied the proceedings.

In reversing the decision to impose sanctions, the Ninth Circuit stated "[w]e agree with the Fifth Circuit that §1927 limits a federal court's ability to sanction an attorney for conduct before another court." *Id.* at 1319. *Matter of Case*, 937 F.2d 1014 (5th Cir.1991). The Ninth Circuit further stated that "the suit filed in state court is an entirely separate action, not subject to the sanctioning power of the district court." *Id.* In *Matter of Case*, the Fifth Circuit stated that "[t]he language of §1927 limits the court's sanction power to attorney's which multiply the proceedings in the case before the court. §1927 does not reach conduct that cannot be construed as part of the proceedings before the court issuing §1927 sanctions." *Matter of Case*, 937 F.2d at 1023. Additionally, the court stated "§1927 cannot reach conduct occurring in a separate state court proceeding no matter how vexatious or multiplicious that conduct may be." *Id.*

Because the issue was not properly before the court in *GRiD*, the Ninth Circuit did not address whether the court could impose sanctions pursuant to the court's inherent powers. *GRiD Systems Corp*, 41 F.3d at 1320. If the issue were properly before the court, however, it is likely that the Ninth Circuit would have again adopted the rationale of the Fifth Circuit and found that the court's inherent power to impose sanctions does not extend to conduct occurring in another court. See *Matter of Case*, 937 F.2d 1014, 1023 (1991). In *Matter of Case*, the Fifth Circuit found that a "[federal] court's inherent power to punish bad-faith conduct does not extend to actions in a separate state court proceeding." *Id.* at 1023. "The conduct of the parties in the state court action cannot be said to affect the exercise of the judicial authority of the [federal] court or limit the [federal] Court's power to control the behavior of parties and attorneys in the litigation before it. Inherent power must arise from the litigation before that court." *Id.* at 1023-24.

In its motion for sanctions, Facebook claims a fraud was committed on the court. As shown, that accusation is wrong, making this motion meritless. The discovery responses, which Facebook contends are wrong, were in fact consistent and supportable pursuant to the Operating Agreement. *See* Section II. C, *supra*. The discovery was not inconsistent with subsequent testimony. *See* Section II. A, *supra*. But even if defendants did take inconsistent positions in their discovery responses as compared to their subsequent Massachusetts Court testimony, and this inconsistent position was for the unsupportable reasons Facebook proffers, *GRiD* and *Matter of Case* prevent sanctions from being imposed here. As demonstrated above, the Court cannot take into consideration the actions taken by the Defendants in Massachusetts no matter how "vexatious or multiplicious that conduct may be." *GRiD Systems Corp.,*, 41 F.3d at 1319. Even if the Defendants took inconsistent positions and the court deemed their conduct sanctionable, the Ninth Circuit is not vested with the authority to issue sanctions based on the what occurred in the Massachusetts action. See *Id.*; *Matter of Case*, 937 F.2d at 1023. This motion must be denied.

### E. Even if the Discovery Responses Were To Be Found Inconsistent With Subsequent Testimony, These Circumstances Do Not Rise to the Required High Levels of Egregiousness to Support an Award of Sanctions

Facebook cites numerous cases in support of its motion for sanctions, however, the sanctionable conduct present in the cited cases is clearly distinguishable from the alleged inconsistencies in the instant case. To even reach this inquiry, the court must find that: 1) the positions taken by the Defendants in the California and Massachusetts actions were inconsistent; 2) the California Superior Court relied on the inconsistent positions in granting Defendants' Motion to Quash; 3) the court is vested with the authority to impose sanctions based on conduct occurring in the Massachusetts proceedings despite the holdings of *GRiD* and *Matter of Case*; and 4) the alleged inconsistent positions were taken recklessly or in bad faith by the Defendants. Even if the court gets this far, it must still deny the motion based on the authority cited by Facebook.

Facebook cites a number of cases including *Chambers* v. *NASCO, Inc.*; 501 U.S. 32, 112 S.Ct. 12 (1991), *Fink* v. *Gomez*, 239 F.3d 989 (9th Cir.2001) and *B.K.B.* v. *Maui Police Dept.*, 276 F.3d 1091 (9th Cir.2002) in support of its Motion for Sanctions. In *Chambers* v. *NASCO, Inc.*, petitioner Chambers, the sole shareholder of a company that operated a television station in Louisiana, agreed to sell the station's facilities and broadcast license to respondent NASCO, Inc. *Id.* at 36. Chambers soon changed his mind regarding the sale and engaged in a series of actions that were designed to frustrate the sale's consummation. Despite the issuance of a preliminary injunction and numerous temporary restraining orders, Chambers continuously abused the judicial process and disregarded the District Judge's warnings that his, and his lawyer's behavior was unethical. *Id.* at 38. Undeterred, Chambers proceeded with "a series of meritless motions and pleadings and delaying actions" which triggered further warnings from the court. *Id.* After the District Court entered judgment in favor of NASCO and after Chambers new attorney was warned that further unethical behavior would not be tolerated, Chambers again ignored the warnings and refused to comply with the terms of the judgment entered against him. *Id.* at 39. Chambers appealed and immediately following oral argument, the Appeals Court imposed appellate sanctions for the frivolous appeal and remanded to the district court to determine whether further sanctions were warranted. *Id.* at 40. The Appeals Court and the Supreme Court both affirmed the District Court's conclusion that full attorney's fees were warranted due to the frequency and severity of Chambers' abuses of the judicial system and the resulting need to ensure that such abuses were not repeated. *Id.* at 56. Indeed, the Court found Chambers' actions were " part of [a] sordid scheme of deliberate misuse of the judicial process" designed " to defeat NASCO's claim by harassment, repeated and endless delay, mountainous expense and waste of financial resources." *Id.* at 56-57.

*Fink* v. *Gomez,* 239 F.3d 989 (9th Cir.2001), was a habeas action stemming from an altercation between the Fink and several prison guards in which Fink was left permanently disabled. *Id.* at 990. Fink also lost good conduct credits due to the altercation with the guards. *Id.* In *Fink* v. *Ylst*[3], the first action filed by Fink after the altercation, the district court issued a conditional judgment requiring the State to restore Fink's good conduct credits unless the State held a new disciplinary hearing within 60 days. *Id.* Some months after the conditional judgment, the district court held an off-the-record phone conversation in which Ylst counsel made a number of factually incorrect representations to the court. *Id.* Ylst counsel's misrepresentations resulted in a needless disciplinary hearing and further adverse consequences for Fink, despite contrary assurances to the court. *Id.* at 991.

The district court specifically found that " [a]ll claims by Ylst Counsel . . . [were] meritless," resulting in adverse consequences for Fink. *Id.* In addition, the court noted that "[i]nformation obtained by the court since the 1998 Disciplinary Hearing, including admissions by

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[3] A civil action brought by Fink against Ylst and other prison guard defendants.

Ylst Counsel, has led the court to the inevitable conclusion that the 1998 Disciplinary Hearing was orchestrated by Ylst Counsel for the purpose of gaining [a] tactical advantage in the Ylst case." *Id.* These findings led the Court to impose sanctions stating that "Ylst Counsel has attempted repeatedly to mislead the court by making misrepresentations regarding the state of the record, the orders of the court, and the actions taken by respondent and the CDC.... It appears that the entire 1998 Disciplinary Hearing, and the events that followed, have been orchestrated by Ylst counsel in bad faith with a view to gaining an advantage in the Ylst case." *Id.*

In *B.K.B.* v. *Maui Police Dept.*, 276 F.3d 1091 (9th Cir.2002), the Plaintiff, a female police officer, sued the police department and county alleging race and sex discrimination. *Id.* at 1095. Prior to trial, defense counsel unsuccessfully filed two separate Rule 412 motions seeking to introduce evidence regarding the plaintiff's sexual practices or fantasies. *Id.* at 1104-05. "Having failed in two previous motions to obtain the court's approval to introduce Rule 412 material, the defendants simply sprang the offending testimony upon the court and then misrepresented the nature of [witnesses] testimony to the trial judge in response to plaintiff's objections that the defense intended to violate Rule 412." *Id.* The Ninth Circuit upheld the issuance of sanctions under both the inherent powers and under §1927. *Id.* at 1107-09. The Ninth Circuit found "[d]efense counsel's sidebar statement to the district court . . . highly misleading." *Id.* at 1107. Further, the court stated "[w]e cannot help but conclude that defense counsel's introduction of [witnesses] testimony was a knowing and intentional violation of Rule 412." *Id.* Finally, the court concludes that "[d]efense counsel's egregious conduct in introducing [the witness] testimony subverted the fundamental purpose of Rule 412 and deprived Plaintiff of a fair trial." *Id.* at 1109.

The offending parties in *Chambers*, *Fink* and *B.K.B.* all demonstrated a level of egregious conduct not found in the present case. Clearly, the "sordid scheme of deliberate misuse of the judicial process" committed by Chambers does not approach the alleged inconsistent positions taken by the defendants in the two separate proceedings. Unlike Chambers, the Individual Defendants never blatantly disregarded restraining orders, preliminary injunctions and clear warnings from a judge that their behavior was unethical. In *Fink*, an inmate lost his liberty due to the egregious conduct of counsel. In *B.K.B.*, counsel for the defendant put a victim's right to a fair trial in jeopardy. Blatantly disregarding judicial orders, making intentional misrepresentations to a court resulting in a loss of liberty, and recklessly jeopardizing a victim's right to a fair trial are the types of conduct the court looks for when imposing sanctions. No equivalent conduct has been alleged by the Plaintiffs, therefore the Motion for Sanctions must be denied.

The Plaintiffs also relied on the recent Qualcomm decisions to support their Motion for Sanctions. See *Qualcomm, Inc.* v. *Broadcom, Corp.*, 2007 WL 2296441; *Qualcomm, Inc.* v. *Broadcom, Corp.*, 2007 WL 2261799. In Qualcomm, the patentee, its employees and its attorneys repeatedly failed to disclose documents relevant to the enforceability of its patents. *Id.* at 5-35. After a verdict was entered in favor of Broadcom, Qualcomm turned over 230,000 pages of emails, company correspondence and memoranda that demonstrated Qualcomm's inequitable conduct throughout the litigation. The court found by "clear and convincing evidence that Qualcomm and its employees orchestrated a plan to ignore Qualcomm's duty to disclose these patents to the JVT (Joint Video Team - the standards setting body that created the H.264 standard), in order to become an indispensable licensor of the H.264 standard." *Id.* at 14. Qualcomm produced hundreds of emails which directly contradicted employee testimony. *Id.* at 16-19. The court found that "Qualcomm's wrongful conduct is further supported by evidence of widespread and undeniable misconducts of Qualcomm, its employees, and its witnesses throughout the present litigation, including during discovery, pre-trial motions practice, trial and post-trial proceedings." *Id.* at 16. Additionally, the court found that "Qualcomm's counsel participated in an organized program of litigation misconduct and concealment throughout discovery, trial, and post-trial before new counsel took over lead role in the case on April 27, 2007." *Id.* at 21.

Broadcom brought a motion for attorney's fees pursuant to 35 U.S.C. Sec. 285, which states "[t]he court in exceptional cases may award reasonable attorney's fees to the prevailing party." 2007 WL 2261799 at 1. In granting full attorney's fees and costs to Broadcom, the District Court found that "[b]ased on the egregiousness of Qualcomm's conduct regarding the JVT and throughout the present litigation, the court FINDS an exceptional case status has been established." *Id.* at 2. To compare the conduct of Qualcomm and its employees to the actions of ConnectU, its founders and counsel is outrageous. Numerous Qualcomm employees were exposed as perjurers who took part in an orchestrated conspiracy to withhold documents and lie at every opportunity to protect their patent rights. At no time during the California or Massachusetts litigation has ConnectU, its founders or its counsel ever committed an act equivalent to the widespread injustice found in *Qualcomm*.

As demonstrated, even Facebook's cases require that this motion be denied.

## III. CONCLUSION

For the foregoing reasons, this motion must be denied, and Facebook should be admonished for misrepresenting court proceedings, and bringing a motion that case law does not support.

Dated: September 19, 2007

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

By: /s/
Scott R. Mosko
Attorney for ConnectU, Inc., Cameron Winklevoss, Tyler Winklevoss, and Divya Narendra